



# Taking the Home

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# Taking the Home

Jeannie Suk\*

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*Abstract. Law resists the uncanny. The home is the exemplar of the uncanny. Two Supreme Court cases, decided four days apart, Kelo v. City of New London and Town of Castle Rock v. Gonzales, grapple with the uncanny home. Both reflect on the meanings of the home as simultaneously the source of security against and the focal point of anxieties about crossing between the categories of the private and the public. This essay traces the specter of doubleness that haunts the home in the law: the uncanny ways in which the home emerges as the exemplary private institution and the exemplary public concern in our society.*

*Keywords: home, property, family, takings, eminent domain, domestic violence, restraining orders, due process, mandatory arrest, criminal law, police enforcement, uncanny, anxiety, horror, haunting, specter, private, public, class, Kelo v. City of New London; Town of Castle Rock v. Gonzales.*

## INTRODUCTION

In this essay, I juxtapose two cases handed down four days apart in October Term 2004: *Kelo v. City of New London*<sup>1</sup> and *Town of Castle Rock v. Gonzales*.<sup>2</sup> These cases reflected on the home and what it means to lose the home. They also both excited significant responses associated with broad-based social movements. My argument, for those who like to have such things stated explicitly at the outset, is as follows. I think a key to making sense of the cases' meanings is the legal traces of the *uncanny* character of the home. The uncanny is a literary term meant to capture a dreadful, horrifying feeling that occurs when the utterly familiar and comfortable (*heimlich*) becomes unfamiliar and frightening (*unheimlich*) before your very eyes.<sup>3</sup> The uncanny is

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the stuff of the house that turns out to be haunted, or Henry James's children, or Stephen King's Maine landscape: something that should be warm and lovely gone cold and creepy by being viewed again in an obliquely different though familiar way.<sup>4</sup>

What was uncanny in *Kelo* was the changing of the home—comforting bastion of the middle-class imagination—into property that can be taken and handed to others. Justice O'Connor deployed the uncanny in her dissenting account of why the taking in *Kelo* was unconstitutional, classing and gendering the problem of economic development takings. The uncanny in *Castle Rock* was twofold: First there was the (gendered) horror of the facts, in which a mother's children were taken from the home by their father and murdered despite her desperate pleas to the police to enforce a restraining order promising protection. Then there was the Supreme Court's inability to accept the full implications of the contemporary reformist domestic violence regime now embraced in established legal circles, that the home should be subject to public control and the criminal law to private control. The Supreme Court was whipsawed between the legally uncanny relation between the home and the criminal law and the factually uncanny terrorizing of the home by the violent patriarch.

If the home is the archetypal site of the uncanny, the judicial opinion presents itself as a genre wholly cabined by norms and rules that resist the uncanny. Judicial opinions about the home thus become vexed in the extreme. On the one hand, the "facts" (as lawyers call them) must be presented, and these reflect astonishing realities that defy ordinary language—in the Supreme Court cases discussed here, the taking and destruction of a family home, and the murder of three children kidnapped by their father from the home and care of their mother. On the other hand, the "law"—which is to say the dense structures of reasoning by text and analogy that are the lifeblood of legal decisions—strives self-consciously to repress disorder, so that the legal results appear inevitable. The difficulty of this effort is manifest in the genre of the judicial opinion, which simultaneously presents and refutes counterarguments, and often appears alongside a dissent offering alternative interpretations.

Interdisciplinary work always presents challenges, but law and literature seems more challenging for lawyers than most. Symposia and anthologies have been published, and legal luminaries have weighed in on methodology. Yet relatively little work takes the straightforward approach I adopt

here: doctrinally attuned examination of core legal texts—here, Supreme Court opinions—using a primary method of literary analysis, namely close reading.<sup>5</sup> On the one hand, this approach should be reminiscent of old-fashioned doctrinal scholarship that engaged in close analysis of the language of cases in the hopes of understanding more about those decisions and about the law. On the other hand, my approach cannot fully boast such traditionalism, as it is informed by literary technique not often used for legal analysis by legal scholars. Literary scholars have had fewer qualms about attending to rhetorical practices in legal materials, but for reasons of disciplinary training, they have usually avoided thorny doctrinal puzzles.<sup>6</sup>

The uncanny haunts the meanings of two Supreme Court opinions released in the same week, both of which grappled with the concept of home. Lest we forget, that means that nine justices and thirty-five law clerks worked on these cases during precisely the same period of time. To any literary reader it would be odd to think that such juxtaposition would not affect the texts produced and the ideas in them. The opinions represent the collective work of justices aided by law clerks, not to mention the myriad lawyers and judges who wrote the briefs and the decisions in the lower courts. Along with the opinions' production of meaning, the cases' public reception is a rich vein to be tapped. And of course an inevitable feature of legal opinions is that they simultaneously take seriously and take for granted the relation between state coercion, life and death, and public meanings produced through texts.

## I. UNCANNY TAKINGS

### A. Home and Hotel

In the summer of 2005, an unusual proposal appeared before the 8,500 residents of Weare, New Hampshire. It was a plan to use the rural town's power of eminent domain to take an eighteenth-century farmhouse, the home of one of its residents, and transform it into an inn to be called the Lost Liberty Hotel.<sup>7</sup> The inn would feature a dining room called Just Desserts Café and a museum open to the public.<sup>8</sup> The stated purpose of this proposed taking was to bring "economic development and higher tax revenue to Weare."<sup>9</sup>

The house was a ramshackle structure on a remote dead-end dirt road.<sup>10</sup> Its well-liked owner was David Hackett Souter, the town's most famous resident. Even at the time of his nomination to the Supreme Court, locals had

been proudly protective of his privacy.<sup>11</sup> Now his unassuming house, which had once belonged to his grandparents,<sup>12</sup> was the focus of a small-town dispute that was garnering national attention.

The cause was the 5–4 judgment in *Kelo v. City of New London*, in which Justice Souter had joined the majority of the Court in deciding that economic development takings did not violate the “public use” requirement of the Takings Clause.<sup>13</sup> The Court held that the Constitution did not prohibit the use of eminent domain to take private property and transfer it to other private ownership as part of a development plan to bring economic benefits to the community. The property owners’ objection that economic development was not a *public* use met with the Court’s response that there is “no principled way of distinguishing economic development from the other public purposes that we have recognized.”<sup>14</sup> Those other public purposes—relieving urban blight in Washington, D.C., and breaking up oligarchic property ownership in Hawaii—the Court said, were not substantially different from the economic development contemplated in New London.<sup>15</sup>

Doctrinally, the case was significant but not pathbreaking.<sup>16</sup> Prior cases had already ruled that taking private property and transferring it to other private ownership could be “public use” if it would serve a public purpose. *Kelo* did no more than hold that public purpose could also include economic development, even when there was no blight or property oligopoly to remove. The decision was not exactly dictated by prior cases, but neither was it a radical departure.<sup>17</sup>

But the public understood *Kelo* differently. Within days of the decision, commentators across the country loudly decried it.<sup>18</sup> Outrage abounded, with characterizations such as “terrifying,” “sickening,” and “creepy.”<sup>19</sup> The practical thrust of the response tended to be similar: in almost every state and innumerable municipalities, spooked citizens proposed laws that would limit the purposes for which government could take property under the rubric of “public use.”<sup>20</sup> These responses were themselves symbolic to a large degree.<sup>21</sup>

The Lost Liberty Hotel proposal was a quirky variant of this legislatively oriented protest movement. Ultimately, Weare residents voted not to take Justice Souter’s home, and instead urged the New Hampshire state legislature to forbid the kind of takings *Kelo* held constitutional.<sup>22</sup> And it was difficult to imagine the farmhouse becoming a hotel (who goes to Weare?).<sup>23</sup> But the incident was an intriguing window into the nature of the public response and the cultural meaning of the case itself.

According to the California businessman who came up with the scheme, the Lost Liberty Hotel had to be built on Justice Souter's property "because it is a unique site being the home of someone largely responsible for destroying property rights for all Americans."<sup>24</sup> The proposal targeted a reclusive justice with strong roots in his home.<sup>25</sup> Going beyond commentary, it aimed to subject Souter to precisely what *Kelo* permitted—to suggest that if he had contemplated his own home being taken for economic development, he would have voted differently.<sup>26</sup>

The proposal sought to punish Justice Souter as a private homeowner for a decision taken in his public role, to assert the inseparability of those identities. The proposal to use *Kelo* itself to take his home and turn it into a hotel staged a performance of *Kelo*'s destabilization of the private/public line. A famously private man, known to seek refuge in his home away from public life in Washington D.C., would be publicly deprived of that private refuge—figuratively and literally.<sup>27</sup> Proposing the transformation of the Souter home into the Lost Liberty Hotel drew on the uncanny association of hotels as home substitutes, in between private and public space.<sup>28</sup> It thereby performed the uncanny idea of home as neither private nor public.

## B. Class and Values, House and Home

There was little surprising to legal academics in the suggestion that "public use" and "private use" may not be clearly delineated.<sup>29</sup> But why did many Americans experience *Kelo* as a distressing tear in the social fabric needing swift repair? The substantial outrage *Kelo* occasioned had to do with the meaning of the home in American social life.<sup>30</sup> The basic idea of losing the home, the center and repository of family life, touched upon a profound and widespread middle-class anxiety.<sup>31</sup>

It is extremely rare for a person to have his home taken by eminent domain.<sup>32</sup> This is not a common problem. The prevalent taker of homes is not the state but private entities, upon foreclosure by creditors. Home, the symbol of the American Dream, is a focal point of great middle-class anxiety, often centered on potential loss to foreclosure.<sup>33</sup> *Kelo*'s facts were uncannily reminiscent of home foreclosure because they involved homes ending up in the hands of other private parties. The social meaning of home loss is the loss of a family's economic stability, and with that the loss of middle-class status.<sup>34</sup> *Kelo* stirred up a fear of falling central to the middle-class psyche.<sup>35</sup> But in a

sense, there was more horror because it was the government's doing, with the Supreme Court's approval.

In referring to the property to be taken from *Kelo's* petitioners, Justice Stevens's majority opinion, holding that the economic development taking was for public use, never used the term "home" at all, but rather "house." The word "home" was featured in the opinion twice: once in referring to the *new* homes that were to be built upon the taking of blighted property in Washington, D.C., and once in referring to the homes *newly* purchased by ordinary people after the taking of oligopolists' property in Hawaii.<sup>36</sup>

In Justice O'Connor's dissenting opinion, by contrast, the *Kelo* petitioners were "nine resident or investment owners of 15 homes."<sup>37</sup> Her opinion used the word "home" eight times throughout, with repeated reference to the fact that the properties to be taken were homes, even though some of the houses were owned as investments.<sup>38</sup> She began by closely associating a petitioner with the property to be taken through a series of rhetorical moves bringing to the surface the home concept:

Petitioner Wilhelmina Dery . . . lives in a house in Walbach Street that has been *in her family for over 100 years*. She was *born* in the house in 1918; her husband, petitioner Charles Dery, moved into the house when they *married* in 1946. *Their son* lives next door with *his family* in the house he received as a *wedding gift*. . . .<sup>39</sup>

This introductory description of the lawsuit featured the major events that comprise the multigenerational life cycles of a family—birth, marriage, rearing children, children's marriage, and grandchildren. Thus when Justice O'Connor pointed out that "the homes of three plaintiffs . . . are to be demolished," and described the lawsuit as an effort "[t]o save their homes," it was as if to suggest that the physical structure housed a family life accreted over generations.<sup>40</sup> The meaning of the taking then was the destruction of Family.

Moreover, the takings were presented as marking the passing of a way of life in which people lived in the house where they were born and married, where their parents and grandparents lived. Justice O'Connor's nostalgic recitation located the Dery family in their New England house for over a century, whereas the average person in today's America changes residences every few years.<sup>41</sup> The details she mentioned also marked the family as white people who had been in America since the nineteenth century.<sup>42</sup> In this respect, the family she showcased was somewhat unusual, resonating obliquely with the



post-*Kelo* public attention to Justice Souter, whose ancestors, including several *Mayflower* passengers, had lived in New England for centuries.<sup>43</sup>

Justice O'Connor, herself a skilled mythmaker of home and family virtue, had recently co-authored with her brother an autobiographical narrative about her family's ranch where she lived from birth through early childhood, and where she later always returned.<sup>44</sup> This ranch—the name of which was the book's title, *Lazy B*—was in her family since the nineteenth century for over a hundred years.<sup>45</sup> Her parents lived there from their marriage until their deaths.<sup>46</sup> Her focus on the Derys and the facts that she saw fit to mention in *Kelo* recall her construction of her family's ranch as the site of autochthonous family life and upbringing rooted in a place, imbued with values, and connected to the past. She writes of how the “power of the memories of life” on the ranch:

[s]urges through my mind and my heart often. . . . We know that our characters were shaped by our experiences there. . . . The value system we learned was simple and unsophisticated and the product of necessity. What counted was competence and the ability to do whatever was required to maintain the ranch operation in good working order. . . . Verbal skills were less important than the ability to know and understand how things work in the physical world. Personal qualities of honesty, dependability, competence, and good humor were valued most.<sup>47</sup>

Note the telling emphasis on the central role of the home in shaping a person; the valorizing of a stripped-down, hardworking, unpretentious way of life; and the paramount virtue of physical work and connection to the land. The mythmaking nostalgia here is about the home's “simple and unsophisticated” values where children are raised to become grounded, honest, modest Americans of good solid character. She believed that these ingrained values were “due to the life created for us by our parents” on the ranch,<sup>48</sup> which she clung to as “a never-changing anchor in a world of uncertainties.”<sup>49</sup> This is a powerful vision of what home can mean and do to a person in the world.

O'Connor tells of a “heart-wrenching time for all the family” when eventually there remained “no family member . . . interested in making the ranch his or her home.”<sup>50</sup> She suggests that the government's tightening regulations on cattle ranching affected the viability of keeping the ranch in the family.<sup>51</sup>

We thought it would always be there, that our children and our children's children would know it as we did. We knew that no matter how far we had traveled, we were still welcome there. . . . The decision to sell, to let the ranch go, was so difficult that I still avoid confronting it directly. I fear returning to the ranch and seeing it in other hands and with all its changes.<sup>52</sup>

If she avowedly avoided confronting the unsettling sight of her family's home in other hands and transformed into something else, she encountered the idea at least indirectly in *Kelo*, where the petitioners stood to have their homes taken for transformation and use by others.

### C. Gendering Takings

Poignantly in *Kelo*, Justice O'Connor ventriloquized the petitioners' argument that though "the government may take their homes" for, say, railroads, it may not take them for "the private use of other owners simply because the new owners may make more productive use of the property."<sup>53</sup> She specifically pointed to petitioners Susette Kelo and Wilhelmina Dery, remarking that they had "well-maintained homes"—in other words, middle class (not blighted).<sup>54</sup> The wrongness of giving these women's homes to more productive users was evident: "For who among us can say she already makes the most productive or attractive possible use of her property?"<sup>55</sup>

With this Justice O'Connor added gender to class in critiquing economic development takings. Her formulation hinted at the phenomenon of keeping up with the Joneses. It sounded like she was channeling an earnest homemaker on the impossibility of reaching a Martha Stewart-type ideal. And not for lack of trying. She just hadn't "already" gotten there and neither had her neighbor. This evinced a sense of what it means to be middle class—aspiring, hoping to do even better, implicitly in competition with others. The "us" in Justice O'Connor's rhetorical question was middle-class homemakers, explicitly female maintainers of the private sphere.<sup>56</sup> These women's homes were being deemed not productive or attractive enough compared to other uses that would benefit the public. This case was not just business. It was personal.

Justice O'Connor's dissent took umbrage on behalf of middle-class American housewives and their way of life. She managed to imply that taking the home because other uses would be more productive or attractive was to disrespect the average homemaker who is decently caring for her home and

family. If property is associated with male ownership, and the house as a castle is associated with a man, the home is associated with women. Her dissent implied a woman's perspective on the taking.<sup>57</sup> Justice O'Connor accordingly shifted the focus from the idea of property to the idea of home, itself implicitly gendered—that was what mattered.

Susette Kelo and Wilhelmina Dery, middle-class white homemakers maintaining their homes, simply did not make sense as people whose property would be taken for public purpose. Justice Thomas reminded us in his own dissent: "Urban renewal projects have long been associated with the displacement of blacks; '[i]n cities across the country, urban renewal came to be known as "Negro removal."'"<sup>58</sup> Indeed he predicted that the future harm of *Kelo*, including "the indignity inflicted by uprooting [individuals] from their homes," would fall on poor and minority communities who are "systematically less likely to put their lands to the highest and best social use. . . ."<sup>59</sup> But Justice O'Connor's approach acknowledged the permissibility of takings where poor persons' property use was actively harming middle-class social and economic aspirations through the creation of urban blight, or where rich oligopolists were impeding the middle-class dream of owning one's own home.<sup>60</sup>

The trouble for Justice O'Connor was the idea that the state could "replac[e] any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory."<sup>61</sup> In this parade of displacement, the "simple and unsophisticated" values that she associated with her roots appear<sup>62</sup>—in the motley tropes of Motel 6, home, and farm—in direct contrast to things that too often supersede those values in modern society: cosmopolitan upscale luxury, suburbanized consumerism, and industrialized estrangement from an agrarian past—sometimes known as economic development.

#### D. Specter of Condemnation

The anxiety of middle-class status resonates with home as the symbol of the all-important public-private line that underlies the notion of property. *Kelo*, according to Justice O'Connor, "wash[ed] out any distinction between private and public use of property."<sup>63</sup> She reasoned that "[t]he trouble with economic development takings is that private benefit and incidental public benefit are, by definition, merged and mutually reinforcing."<sup>64</sup>

If any private-to-private transfer of property that benefited the public could easily be recast as having a public purpose, the private-public line was rendered so manipulable as to be erased.

Justice O'Connor stated it dramatically: "The specter of condemnation hangs over all property."<sup>65</sup> Condemnation in property language has two obvious meanings: The first is the exercise of eminent domain. The second is the pronouncement of a structure as unfit for habitation. The implicit judgment that a home, however well maintained, is not productive or attractive enough to be saved partakes of both of these meanings. It was as if the bourgeois institution of the home were being destroyed precisely by being subjected to the considerations about economic productivity from which home is imagined to be the refuge.<sup>66</sup>

The adage that a man's house is his castle suggests a middle-class person at home on a par with any rich man, even the king.<sup>67</sup> Home renders a person a king in important part because the home is a bulwark against even the king's intrusion.<sup>68</sup> It would not be too much to say that it is difficult to imagine the middle-class person's rights and status without the concept of the home. Justice O'Connor's home discourse drew out the bond between bourgeois status and private property.

The home emerged as the center around which revolved the intimately linked anxieties about middle-class status and the private-public distinction. As a doctrinal matter, of course, *Kelo* was not about the home in particular, as its holding applied to any private property.<sup>69</sup> The problem was not the taking of a home for public use. It was rather that the home, the archetype of property, was the site of the turning of the public-private distinction on its head. But the public reaction to *Kelo* transcended actual fear of condemnation, inchoate class interest, or abstract investment in the public-private distinction. It manifested a barely repressed dread in the middle-class thought-world, the dread of home loss. In this light, *Kelo* was downright unhomey. The "specter of condemnation" was the anxiety of loss of middle-class status that hangs over the home and is embodied in it.

The image of a "specter" here bears another look. A specter is a ghost that haunts. A home that is not a refuge is haunted—haunted by anxiety of its own destruction. Justice O'Connor seemed to figure the *Kelo* decision itself as a kind of uncanny, ghostly presence haunting the home. The urge to overturn *Kelo* is the urge to exorcise the home by keeping the private private and the public public. The likely unconscious reference to the

beginning of *The Communist Manifesto* (“A spectre is haunting Europe—the spectre of communism.”) then resonates with the haunting warning of the destruction of private property.<sup>70</sup>

## II. UNCANNY PROPERTY

### A. Horror Story

Days after the *Kelo* decision, another constitutional case in its own way engaged the Court in unsettling property notions surrounding the home. *Town of Castle Rock v. Gonzales* had the most uncanny facts possible: the murder of children by their father when the police failed to enforce a domestic abuse restraining order.<sup>71</sup> The legal question was whether the government’s failure to enforce the order was a deprivation of . . . yes, property.

Jessica Gonzales had obtained a domestic abuse restraining order commanding her husband not to “molest or disturb the peace of” his wife and children, and to stay at least 100 yards from the family home.<sup>72</sup> The order directed the police that they “shall use every reasonable means to enforce” the order, and “shall arrest” or seek an arrest warrant if they had probable cause to believe the order had been violated.<sup>73</sup>

One day, her husband went to the family home and abducted his three daughters from the lawn where they were playing.<sup>74</sup> Jessica called the police to request enforcement of the order, but despite five calls over almost five hours and a visit to the police station, the police did not attempt to arrest her husband.<sup>75</sup> Nearly eight hours after her first call, her husband went to the station, opened fire with a semiautomatic weapon, and was immediately shot dead.<sup>76</sup> Their murdered daughters were in the back of his pickup truck.<sup>77</sup>

These dreadful events from the annals of domestic violence wherein an abusive father became murderous seem to verge on a horror story. In the last thirty years, the iconic cultural image of the father who goes mad and terrorizes the family is Jack Nicholson’s face as Jack Torrance in Stanley Kubrick’s film *The Shining*, chopping an ax through the door in pursuit of his wife.<sup>78</sup> The home is the Overlook Hotel, where Jack is a new caretaker, and he and his wife and son are isolated there during the winter off-season. He has been told that a previous caretaker of this hotel had gone crazy of cabin fever and brutally killed his wife, his two young daughters, and himself.

That Jack is a caretaker of the hotel rather than a proper patriarch in his own home allegorizes the failures and disappointments of modern familial masculinity. The classic genre of the haunted house lends to frightening reflection here on anxieties of the American middle-class family.<sup>79</sup> The haunting of the hotel—uncannily both home and not home<sup>80</sup>—converges in the film with our culture's exemplary domestic horror: the destruction of the family by the violence of the patriarch.<sup>81</sup> The figure meant to provide for the home's safety turns out to be the most terrifying threat to it.

## B. A Private Right to the Police?

As I have argued elsewhere, an important feature of the criminal law of domestic violence ("DV") today is the criminal law's treatment of an abuser's presence in the home as a proxy for DV, through the issuance and enforcement of restraining orders.<sup>82</sup> A crucial piece of the contemporary DV enforcement regime is mandatory arrest for restraining order violations, which produces an expectation of police supervision, to ensure that the violent husband stays away from the home. The claim that the Supreme Court addressed in *Castle Rock* unfolded this expectation to its logical conclusion. The case arose when Jessica Gonzales sued the town of Castle Rock for damages, on the theory that the failure to enforce her restraining order violated federal constitutional due process.<sup>83</sup> Ultimately, the Supreme Court had to resolve whether a recipient of a DV restraining order has a constitutionally protected property right to its enforcement by the police.

To understand how the DV regime we have today plausibly raises such a question, it is necessary first to recall that the DV restraining order reallocates property in the home.<sup>84</sup> The restraining order typically bans its subject's presence in the family home. The exclusion of a husband means the corresponding conferral on a wife of the exclusive right of possession.<sup>85</sup> The restraining order thus functions as conferral of a property interest that is enforced by criminal law.<sup>86</sup>

DV mandatory arrest laws that require the police to arrest upon probable cause for restraining order violations aim for mandatory criminal enforcement of this property reallocation. The purpose is to have the police maintain the abuser's exclusion, and leave the police without discretion to treat the abuser's presence other than as a crime. The goal is to overcome the distinctive

problems associated with DV enforcement, including the traditional reluctance of the police to intervene in family quarrels and a DV victim's typical doubts about whether she wants her husband treated as a criminal.<sup>87</sup> To that end, it becomes necessary for the police to enforce the taking of the home from the violent man and the exclusive conferral on the abused woman of the right to possess the home—the state's solution to the domestic horror.

The context for *Castle Rock* is thus a DV regime that reallocates rights to possess the home and makes criminal enforcement of that property reallocation mandatory. The Tenth Circuit sitting en banc held that a recipient of a DV restraining order had a protected property interest in its enforcement by the police, and that failure to enforce it was deprivation of property without due process.<sup>88</sup> Thus Jessica Gonzales could win her suit for damages against the town if the facts were established.

The Tenth Circuit framed the issue within the doctrinal lens of procedural due process,<sup>89</sup> relying on the line of cases in which the Supreme Court had recognized that certain state-created property entitlements may not be taken away without due process.<sup>90</sup> The particular entitlement at stake in this case was police enforcement, which the Tenth Circuit thought comparable to other government services that the Supreme Court had previously deemed protected property interests, such as a free education, continued utility service, and welfare or disability benefits.<sup>91</sup> The restraining order, the Tenth Circuit reasoned, commanded enforcement, using mandatory language that limited police discretion, as did the state mandatory arrest statutes.<sup>92</sup>

"Recogniz[ing] domestic abuse as an exceedingly important social ill,"<sup>93</sup> the Tenth Circuit noted, the legislature had aimed "to alter the fact that the police were not enforcing domestic abuse restraining orders."<sup>94</sup> Changing this law enforcement norm was a means to "attack the domestic violence problems" proper, with the goal of holding the "perpetrator . . . accountable for his actions," and making the "victim . . . feel safe."<sup>95</sup> The court concluded that the restraining order and the mandatory arrest statutes together created a protected property interest in police enforcement that the state could not deny without due process.<sup>96</sup>

The initially surprising idea that a DV restraining order confers a property right to police enforcement is not so surprising when viewed in light of the expectation of police supervision of the home that the DV regime creates. Since the restraining order's property-reallocating function is a key component of DV enforcement, a recipient of an order is a recipient of

a state-conferred property interest in the home. If the party from whom the state has taken the property interest does not abide by the reallocation, mandatory arrest laws require the police to arrest him.

It then becomes a very plausible further step to see the recipient of the order as having not only a right to exclusive possession of the home, but also a right to police enforcement of that reallocation of property. After all, without enforcement, what good is the order?<sup>97</sup> It is as if the idea of property were contagious, moving from a right in the home to a right in police enforcement of a right in the home. Thus witness a slide from an expectation that the police will enforce state-conferred property rights in the home to a conception of criminal law enforcement in the home as a property right.

What emerges out of the expectation of police supervision in the home is the ultimate solution to the horror of domestic violence. The DV restraining order becomes a kind of *super-property*: property given to the victim by the state with the mandatory promise to protect and arrest. That is the answer to the anxiety of the violent destruction of the home. One can then construe the failure of enforcement as a deprivation of property that the state had previously conferred: the safe home promised.

### C. Reaction

All this may sound reassuring as a legal denouement to a domestic horror story. But the Supreme Court reedited the film to produce a different result. Justice Scalia, writing for a Court of seven justices over the dissent of Justice Stevens (joined by Justice Ginsburg), reversed the Tenth Circuit and held that a restraining order does *not* confer a property right to police enforcement. Even in rejecting such a right as a matter of federal constitutional due process, the Court struggled with the well-accepted logic of the DV mandatory arrest regime that had led to the lower court's conclusion that a restraining order creates a property right to police enforcement.

The Court acknowledged that DV mandatory arrest statutes were often considered more mandatory than traditional mandatory arrest statutes, but emphasized that even so, the police still retained discretion in particular instances.<sup>98</sup> Language providing that the police "shall use every means to enforce a restraining order" was not strong enough to make police enforcement actually mandatory, and therefore could not create a constitutional entitlement to enforcement.<sup>99</sup>



Women's advocates condemned *Castle Rock* as an appalling repudiation of DV reform efforts over the last thirty years, not to mention a dangerous ruling for battered women.<sup>100</sup> DV mandatory arrest laws *were* supposed to take away police discretion not to arrest. Justice Stevens's dissent recounted that "[s]tates passed a wave of these statutes in the 1980's and 1990's with the unmistakable goal of eliminating police discretion in this area."<sup>101</sup> The Court seemed to be rejecting this widespread understanding of a major DV reform goal.<sup>102</sup> A conference held in the wake of *Castle Rock* was called "Some are Guilty—All are Accountable: Accountability in the Age of Denial." The advert called the Court's decision "shocking for its message to survivors, advocates, scholars and state actors that 'shall' really didn't mean shall at all. . . . [T]he majority marginalized the legislative history of thirty-two jurisdictions that enacted mandatory legislation and rendered invisible the pain of battered women and that of a movement."<sup>103</sup> The academic commentary on *Castle Rock* has been similarly critical.<sup>104</sup> But a contrary ruling in *Castle Rock* might predictably have led to a tightening of issuance of DV restraining orders, as governments came to terms with the restraining order's creation of an entitlement that left them open to suits for damages, contingent in each instance on unpredictable acts of violent individuals. Abuse victims might well have faced a higher bar to obtaining orders than they currently do, and hence increased danger. Thus the wish to have DV mandatory arrest laws declared truly mandatory had a symbolic dimension for the DV movement that was not only about protecting DV victims from harm.

The Supreme Court in *Castle Rock* gestured toward the possibility that truly mandatory language, if adopted, might well create an entitlement to police enforcement.<sup>105</sup> It was true that the denial of federal constitutional liability did not block states from creating and imposing liability in their own spheres.<sup>106</sup> The decision did spawn public calls for state legislative action.<sup>107</sup>

But in dicta, the Court indicated that even if state legislatures strengthened the mandatory language, it still might not be prepared to find federal constitutional liability. That is, even if the police were clearly divested of any discretion, that still might not mean that an individual had an entitlement to have the police perform an arrest.<sup>108</sup> The reason? "The serving of *public rather than private* ends is the normal course of the criminal law. . . ."<sup>109</sup> Presenting a conception of criminal law as having public purpose, the Court stated that private harm must be subordinated to the public purpose of criminal law.<sup>110</sup> The notion of a private right to criminal enforcement was anathema.

But feminists had long struggled to impress upon the public that the interest in combating violence in the “private” sphere of the home was just as “public” as the states’ enforcement of criminal law in public space.<sup>111</sup> The goal had been to locate DV fully in the ambit of criminal law and to have DV treated as a public matter. As DV has increasingly attained that sought-after public status, there remains little of the past doubt about whether DV is a crime. Legislatures, prosecutors, judges, and the public now do see DV as a public harm that should appropriately be addressed, often on a mandatory basis, by the criminal law.<sup>112</sup>

This acceptance enabled the en banc Tenth Circuit and two dissenting Justices of the Supreme Court to see police enforcement of DV restraining orders as nondiscretionary and thus something a private individual could claim was a state-created entitlement. Much of Justice Stevens’s dissent agreeing with the Tenth Circuit faithfully recited the DV movement’s tenets with respect to mandatory arrest laws’ goal to break down the perceived public-private wall that long justified police non-enforcement of DV.<sup>113</sup>

The historic rise of the public-purpose conception of DV enforcement must be juxtaposed with the Supreme Court’s resistance to the notion of a private entitlement to police enforcement. If a DV restraining order violation is to be enforced by the police with arrest, then that is a public rather than a private matter. To accept the public purpose of DV enforcement was to think of DV as part of criminal law enforcement. A private suit for damages based on the failure to enforce criminal law seemed, to Justice Scalia, obviously inconsistent with the idea that criminal law vindicates the public interest.

Indeed, the Court suggested further that even if state law did create a private entitlement to police enforcement, that entitlement *still* might not constitute “property” for purposes of federal constitutional due process.<sup>114</sup> The logic of this dictum was that a private party’s interest would be arising “incidentally” out of the traditional government function of arresting criminals.<sup>115</sup> In other words, while criminal law (of trespass, burglary, and robbery, for example) ordinarily does enforce private property rights, it had never conferred on crime victims what I have above called a super-property right—a property right to enforcement of the criminal law.<sup>116</sup> The Court’s resistance to super-property was based on the selfsame premise to which DV advocates were committed: that DV is crime, and that criminal law serves public rather than private interests. Jessica Gonzales’s claim thus ran headlong into the

legal uncanniness of conceiving a private right to something as quintessentially public as police enforcement of criminal law.

#### D. Haunted Houses

The claim that nonenforcement of the order was a deprivation specifically of *property* drew upon a meaning that the DV restraining order entails in the legal system today: the state is supposed to ensure a DV victim *her home*—its safety, security, comfort, and protection. In this story, the state gave her exclusive possession of the family home by way of the restraining order. The state then had to ensure that she possessed the home and that her husband stayed away so the family would be secure. And finally, the state took the home from her by failing to provide the promised protection. Taking away that promised protection was in effect taking away the home. Thus it was like deprivation of property.

Couching police enforcement of a DV restraining order as a property right, as the Tenth Circuit en banc did, was a logical extension of the view that a DV victim's security in her home necessitates not only police enforcement, as with other criminal law, but mandatory enforcement. The notion that she had a super-property right reflected the way in which the home, the archetype of private property, was increasingly reconceived as a space in which public supervision was expected. The battered woman's home space could be understood to be conferred, maintained, and supervised by the public. The domestic horror was without question a public matter. Thus when the violent patriarch went crazy and murdered the children, the state's failure to prevent it was the wrong. Because the state had issued a restraining order against him, the state was effectively deemed responsible for the harm that a violent person could possibly inflict.

The DV movement has had much success in convincing legal actors of the public nature of private violence. Thus we might wonder why the seven Justices of the *Castle Rock* majority did not take the legally plausible approach adopted below by the Tenth Circuit en banc and two dissenting Supreme Court Justices. An answer is suggested by considering how thoroughly the logic of the restraining order in a DV mandatory enforcement regime envisions the home as appropriately subject to state supervision and control in service of the public interest: a home is made public, but with the purpose of protecting a private woman. In this regime, the home could be taken (from the

husband) and given (to the wife) in the public interest. But ironically, public failure to enforce that allocation gave rise to a claim for damages that revealed the purpose of public supervision and control as essentially a private one.

*Kelo*'s four dissenting Justices (O'Connor, Rehnquist, Scalia, and Thomas) were avowed maintainers of the conceptual public-private line upon which the system of private property was thought to rest. For them, private property could be taken for public use; but public purpose and private purpose had to be meaningfully distinct from each other. These four Justices, along with more liberal Justices Kennedy, Souter, and Breyer, formed the majority in *Castle Rock*, decided days later. Perhaps similarly, the criminal law's treatment of the home—that symbolic bastion of private property—as within public supervision and control, for the purpose of an entitled private person, was uncanny. Private property taken for public purpose was comfortable enough. But the home as public property taken and maintained for private purpose? That was uncanny.

The uncanny specter that haunted the home in *Kelo* was home loss, and in *Castle Rock* it was home violence. The home is simultaneously the source of security against those anxieties and the focal point of those anxieties. The state is at once the solution and the problem. The imaginative stakes here lie in the relation between the home and the police. Would the expectation of the state's full control of the home become an accepted legal commonplace? The resistance of the *Castle Rock* majority to a *property* right to police enforcement partook of anxiety also evinced in the *Kelo* dissent—that through fancy manipulation of concepts of public and private, the home became so thoroughly subject to the public interest that perhaps it would be as public as, or more public than, the public streets. The home was haunted by the specter of becoming at once the exemplary private and the exemplary public space in the contemporary legal imagination—a specter that was raised by the legal response to uncanny facts of home destruction through condemnation and violence.

## CONCLUSION: UNCANNY CHIASMUS

Out of the juxtaposition of *Kelo* and *Castle Rock* emerges a paired chiasmus.<sup>117</sup> *Kelo* was supposed to be about the taking of private property for a public purpose. Justice O'Connor's dissent suggested not merely the much-vaunted elision of private and public, but outright reversal, wherein the home effectively

became “public” property, used for “private” purpose. She translated the meaning of this conceptual crossing into a gendered middle-class anxiety that haunts the American home. In *Castle Rock*, the Tenth Circuit en banc decision had in effect recognized the violent home as “public” in the sense of being under government supervision, and nevertheless viewed the police as having an essentially “private” purpose to protect it. But all the same, this crossing from private home/public criminal law to public home/private criminal law was uncanny, even as a legal response to the horror of the destructively violent father who terrorizes the home. The Supreme Court found it necessary to reverse it.

In both cases the home was haunted by the crisscrossing of private and public—the specter of condemnation, the fear of falling, the violent patriarch. The uncanny was the byproduct. If the word *unheimlich*, or unhomely, suggests the home as archetypal site of the uncanny, these cases together reveal the legal uncanny that home can uniquely produce.<sup>118</sup> Law makes and unmakes the home. And the law of the home is uncanny law.

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1. 545 U.S. 469 (2005).

2. 545 U.S. 748 (2005).

3. See 17 Sigmund Freud, “The Uncanny,” in *The Standard Edition of the Complete Psychological Works of Sigmund Freud*, James Strachey et al. eds. & trans. (1955), 217, 220–25.

4. See, e.g., Shirley Jackson, *The Haunting of Hill House* (New York: Penguin Books, 2006 [1959]); Henry James, *The Turn of the Screw*, Peter G. Beidler ed. (Boston, New York: Bedford Books, 1995 [1898]); Stephen King, *Dolores Claiborne* (New York: Viking Penguin, 1993); *Dolores Claiborne* (Warner Bros. Pictures, 1995).

5. Cf. Peter Brooks, “A Slightly Polemical Comment on Austin Sarat,” 10 *Yale Journal of Law and the Humanities* 409, 410–12 (1998) (observing that “literary study can propose to the law a kind of slow, close textual reading,” and “a practice whereby the ways of reading developed in one field are used to expose the exclusions and self-delusions of the other”).

6. See, e.g., Peter Brooks, *Troubling Confessions* (Chicago: University of Chicago Press, 2000); Shoshana Felman, *The Juridical Unconscious* (Cambridge: Harvard University Press, 2002); Barbara Johnson, “Anthropomorphism in Lyric and Law,” in *Persons and Things* (Cambridge: Harvard University Press, 2008), 188; Deborah Nelson, *Pursuing Privacy in Cold War America* (New York: Columbia University Press, 2002).

7. See Benjamin Weyl, “Activist Tries a Grab for Jurist’s Property,” *Los Angeles Times*, June 30, 2005, at A10.

8. *Id.*
9. Letter from Logan Darrow Clements, Freestar Media, to Chip Meany, Code Enforcement Officer, Town of Weare, N.H. (June 27, 2005), <http://www.freestarmedia.com/hotellostliberty1.html>.
10. See Robert Friedman, "In Search of Souter: First, You Have to Find His House," *St. Petersburg Times*, Oct. 28, 1990, at D1; John Tierney, Op-Ed., "Supreme Home Makeover," *New York Times*, Mar. 14, 2006, at A27.
11. See Aaron Zitner, "Town is Quietly Proud of 'Country-Boy' Judge," *Boston Globe*, July 25, 1990, at B1.
12. Tinsley E. Yarbrough, *David Hackett Souter: Traditional Republican on the Rehnquist Court* (Oxford, New York: Oxford University Press, 2005), 6.
13. 545 U.S. 469, 472–89 (2005) (Stevens, J.). The Takings Clause of the Fifth Amendment to the Constitution provides: "[N]or shall private property be taken for public use, without just compensation." U.S. Const. amend. V.
14. 545 U.S. at 484.
15. *Id.* at 484–86 (discussing *Berman v. Parker*, 348 U.S. 26 (1954) (urban blight), and *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984) (oligopoly)).
16. See, e.g., Abraham Bell & Gideon Parchomovsky, "The Uselessness of Public Use," 106 *Columbia Law Review* 1412, 1418 (2006); Marcilynn A. Burke, "Much Ado About Nothing: *Kelo v. City of New London*, *Babbitt v. Sweet Home*, and Other Tales from the Supreme Court," 75 *University of Cincinnati Law Review* 663, 683 (2006) ("That the Court honored the doctrine of stare decisis was quite unremarkable.").
17. See, e.g., Charles E. Cohen, "Eminent Domain after *Kelo v. City of New London*: An Argument for Banning Economic Development Takings," 29 *Harvard Journal of Law and Public Policy* 491, 500 (2006) (noting that "the so-called 'broad view' of public use is so deeply entrenched in American case law that it would have required a radical break from history and precedent for the *Kelo* court to have ruled otherwise").
18. See, e.g., Kenneth R. Harney, "Eminent Domain Ruling Has Strong Repercussions," *Washington Post*, July 23, 2005, at F1 ("To call it a backlash would hardly do it justice. Calling it an unprecedented uprising to nullify a decision by the highest court in the land would be more accurate.").
19. See Elizabeth Kreul-Starr, Editorial, "Decision Eminently Wicked," *News & Observer* (Raleigh), June 30, 2005, at A11 ("The prospects are terrifying. In a 5–4 decision, the Supreme Court has sanctioned the right of the government to take your home and build something that will bring in greater tax revenue."); Bill Steigerwald, Editorial, "Creepy Deference to Hacks," *Pittsburgh Tribune-Review*, July 3, 2005, D3 ("The most sickening thing about the majority opinion written by Stevens, however, is the creepy deference he gives to the brains, motives and morals of the local political hacks who've misused eminent domain for decades to wreck and ruin large swaths of our greatest cities.").
20. See Web Release, Inst. for Justice, Susette Kelo Lost Her Right, She Lost Her Property, but She Has Saved Her Home (June 30, 2006), [http://www.ij.org/private\\_property/connecticut/6\\_30\\_06pr.html](http://www.ij.org/private_property/connecticut/6_30_06pr.html). See also John M. Broder, "States Curbing Right to Seize Private Homes," *New York Times*, Feb. 21, 2006, at A1 ("In a rare display of unanimity that cuts across partisan and geographic lines, lawmakers in virtually every statehouse across the country are advancing bills and constitutional amendments to limit use of the government's power of eminent domain to seize private property for economic development purposes.").
21. See David Barron, "Eminent Domain Is Dead! (Long Live Eminent Domain!)," *Boston Globe*, Apr. 16, 2006, at D1 (noting that most anti-*Kelo* bills "have more bark than bite" in that they "tend to allow exemptions for eminent domain aimed at redevelopment in blighted areas" and are "riddled with carve-outs in which the very thing that supposedly must be stopped . . . is permitted").
22. See Associated Press, "Voters Reject Proposal to Seize Souter's House," *Philadelphia Inquirer*, Mar. 15, 2006, at A8.

23. See Elizabeth Mehren, "Political Lightning Rod Planted on New Hampshire Farmhouse," *Los Angeles Times*, Aug. 1, 2005, at A10 (quoting a Weare resident's opinion that "anybody who has been there knows it is the furthest thing possible from a worthwhile location. It is right on the flood plain.").
24. Press Release, Freestar Media (June 27, 2005), <http://www.freestarmedia.com/hotellostliberty2.html>.
25. See Friedman, *supra* note 10.
26. See Mehren, *supra* note 23 (quoting a Weare resident's statement that "we are not going to protect Justice Souter from his own rules. . . . A quaint country inn is something that people will go to. It would become a historical landmark: land that used to belong to a Supreme Court justice—land that showed that one small town in America stood up and said no.").
27. See "Souter Visits Groundbreaking for New School, Not a New Hotel," *Union Leader* (Manchester, N.H.), Apr. 10, 2006, at A7 ("In Washington for Supreme Court terms, [Justice Souter] said he numbers the days until he can return to New Hampshire for breaks.").
28. Cf. Tyson Lewis & Daniel Cho, "Home Is Where the Neurosis Is: A Topography of the Spatial Unconscious," 64 *Cultural Critique* 69, 79 (2006) ("The hotel traps the bourgeois subject within a miserable double bind in which ownership presents the best and worst aspects of the home.").
29. See, e.g., Timothy Sandefur, "A Gleeful Obituary for *Poletown Neighborhood Council v. Detroit*," 28 *Harvard Journal of Law and Public Policy* 651, 658 (2005) ("The distinction between public and private use continued to erode into the early years of the twentieth century."); see also Nicholas William Haddad, "Public Use or Private Benefit? The Post-*Kelo* Intersection of Religious Land Use and the Public Use Doctrine," 75 *Fordham Law Review* 1105, 1110 (2006) ("Despite general acceptance of the notion that the public use requirement imposes at least some substantive limitations on government takings, there is no bright-line rule as to the distinction between private and public uses."); John M. Zuck, "*Kelo v. City of New London*: Despite the Outcry, the Decision Is Firmly Supported by Precedent—However, Eminent Domain Critics Still Have Gained Ground," 38 *University of Memphis Law Review* 187, 229 (2007) ("*Kelo*, while controversial and overwhelmingly viewed in a negative light, said almost nothing new.").
30. See Teresa A. Sullivan, Elizabeth Warren & Jay Lawrence Westbrook, *The Fragile Middle Class: Americans in Debt* (New Haven, Conn.: Yale University Press, 2000), 199 ("Homeownership is the status to which most Americans aspire. . . . Homeowners are widely regarded as the backbone of a large and stable group that will mow lawns, support local schools, worship regularly, pick up litter, obey traffic laws, and perform the thousand acts of responsibility that weld a community together."); Elizabeth Warren, "The Economics of Race: When Making It to the Middle Is Not Enough," 61 *Washington and Lee Law Review* 1777, 1787 (2004) ("For most middle class Americans, both social and economic life center around the home. . . . Over time, homes become repositories of the families' collective memories, serving as a silent reminder of the children who grew up and the adults who aged in these rooms."); Elizabeth Warren, "The Growing Threat to Middle Class Families," 69 *Brooklyn Law Review* 401, 406 (2004) (suggesting "homeownership is the emblem of achieving middle class respectability").
31. Cf. Corinne Calfee, "*Kelo v. City of New London*: The More Things Stay the Same, The More They Change," 33 *Ecology Law Quarterly* 545, 576 (2006). ("*Kelo* involved white, middle-class petitioners, and this image evoked more nationwide concern for property rights than have other condemnations."); David A. Dana, "The Law and Expressive Meaning of Condemning the Poor after *Kelo*," 101 *Northwestern University Law Review* 365, 366 (2007) (noting that *Kelo* spawned public outrage because it involved condemnation of middle-class homes); Wendell E. Pritchett, "Beyond *Kelo*: Thinking about Urban Development in the 21st Century," 22 *Georgia State University Law Review* 895, 907–08 (2006) ("Given America's obsession with homeownership, it is hardly surprising that an overwhelming majority of the public is concerned that the government may take the homes of fellow citizens.").



32. See, e.g., Marc B. Mihaly, "Living in the Past: The *Kelo* Court and Public-Private Economic Redevelopment," 34 *Ecology Law Quarterly* 1, 27 (2007) (characterizing condemnation under eminent domain as "rare and expensive").
33. See Elizabeth Warren & Amelia Warren Tyagi, "What's Hurting the Middle Class," *Boston Review*, Sept./Oct. 2005 ("It is middle-class homeowners who lose their houses to foreclosure—people who once saved enough money for a down payment, and who survived the most rigorous credit screen imposed in consumer financial markets."). The mortgage crisis has recently turned this latent anxiety into widespread disastrous reality. See Manny Fernandez, "Helping to Keep Homelessness at Bay as Foreclosures Hit More Families," *New York Times*, Feb. 4, 2008, at B6 ("The situation has upended the very definition of the needy, as working-class families in tree-lined, middle-class neighborhoods go from being homeowners to homeless in a matter of months. The transition comes not only as a psychological and emotional shock, but a financial one, too."); Brad Heath & Charisse Jones, "In Denver, Foreclosures and a Dramatic Exodus," *USA Today*, Apr. 2, 2008, at A1 ("For hundreds of homeowners in this mostly middle-class corner of Denver—and an estimated 1.2 million more nationwide—the wave of foreclosures battering U.S. financial markets is quickly unraveling the American dream. Those who have lost homes here describe seeing their lives crumble into anxiety and embarrassment."); John Kerry, Op-Ed., "Mortgage Crisis Calls for Defense: Nobody Wins with Foreclosures," *Boston Herald*, Feb. 25, 2008, at 17 ("Each time a home is foreclosed upon, a family's economic dream lies in tatters and neglected buildings can bring urban blight and destroy entire neighborhoods."); Brigid Schulte, "My House. My Dream. It Was All an Illusion.: Latina's Loss in Va. Epitomizes Mortgage Crisis," *Washington Post*, Mar. 22, 2008, at A1 (describing foreclosure experience of former Alexandria resident who "no longer dreams of owning a home in America").
34. Carrie Teegardin, Ann Hardie & Alan Judd, "Swift Foreclosures Dash American Dream," *Atlanta Journal-Constitution*, Jan. 30, 2005, at A1 ("When a family loses its home, the children are taken out of school, the family's greatest hope for long-term economic stability is lost, the retirement fund that was going to be the paid-off house has disappeared.") (quoting Elizabeth Warren).
35. See Barbara Ehrenreich, *Fear of Falling: The Inner Life of the Middle Class* (New York: Pantheon, 1989).
36. *Kelo v. City of New London*, 545 U.S. 469, 485 n.13 (2005) (quoting *Berman* on the need in that case "to redesign the whole area so as to eliminate the conditions that cause slums . . . so that a balanced, integrated plan could be developed for the region, including not only new homes, but also schools, churches, parks, streets, and shopping centers") (emphasis added); *id.* at 485 (demonstrating that "the government's pursuit of a public purpose will often benefit individual private parties," with the example that "in *Midkiff*, the forced transfer of property conferred a direct and significant benefit on those lessees who were previously unable to purchase their homes") (emphasis added).
37. *Id.* at 494 (O'Connor, J., dissenting).
38. *Id.* at 494–96, 500, 503.
39. *Id.* at 494–95 (emphases added).
40. *Id.* at 495.
41. A 2006 U.S. Census Bureau survey indicates that the median year that a householder moved into a unit was 2000. Bureau of the Census, U.S. Dept. of Commerce, Am. Community Survey, at Table No. B25039 (2006).
42. The petitioners' brief stated that Wilhelmina Dery's family came from Italy in the 1880s. See Brief of Petitioners at 1–2, *Kelo v. City of New London*, 545 U.S. 469 (2005) (No. 04–108). Cf. also Calfee, *supra* note 31, at 576 ("Kelo involved white, middle-class petitioners"); Pritchett, *supra* note 31, at 908 (stating the homes in *Kelo* were "owned by white, middle-class residents").
43. See Yarbrough, *supra* note 12, at 4.
44. See Sandra Day O'Connor & H. Alan Day, *Lazy B* (New York: Random House, 2002), 95, 116–17, 297–99.



45. *Id.* at viii, 310–11.
46. *Id.* at xi.
47. *Id.* at 315.
48. *Id.* at 317.
49. *Id.* at 298.
50. *Id.* at 310–11.
51. *Id.* at 308 (discussing the increasing bureaucracy involved in public-land grazing due to Bureau of Land Management regulations such as decreasing the numbers of cattle ranchers could run).
52. *Id.* at 316.
53. *Kelo v. City of New London*, 545 U.S. 469, 496 (2005) (O'Connor, J., dissenting). See also Richard A. Epstein, "Kelo: An American Original: Of Grubby Particulars and Grand Principles," 8 *Green Bag* 2d 355, 356 (2005) ("For most people, the key question was whether a man's home is his castle, for which the naïve answer is yes, except when property is used for traditional public purposes such as roads and parks.")
54. *Kelo*, 545 U.S. at 500 (O'Connor, J., dissenting).
55. *Id.* at 503.
56. Cf. Betty Friedan, *The Feminine Mystique* (New York: Dell, 1963).
57. Cf. Peggy Cooper Davis & Carol Gilligan, "A Woman Decides: Justice O'Connor and Due Process Rights of Choice," 32 *McGeorge Law Review* 895, 897 (2001) (reading Justice O'Connor in light of Carol Gilligan's *In a Different Voice* (Cambridge: Harvard University Press, 1982), and arguing that O'Connor's "reproductive rights jurisprudence has revealed strengths that have to do with gender").
58. *Kelo*, 545 U.S. at 522 (Thomas, J., dissenting) (quoting Wendell E. Pritchett, "The 'Public Menace' of Blight: Urban Renewal and the Private Uses of Eminent Domain," 21 *Yale Law and Policy Review* 1, 47 (2003)).
59. *Id.* at 521–22. For discussions of class implications of *Kelo*, see David J. Barron & Gerald E. Frug, "Make Eminent Domain Fair for All," *Boston Globe*, Aug. 12, 2005, at A17 (warning that proposed federal legislation post-*Kelo* would "provide protection for those living in middle-class and wealthy neighborhoods while placing no additional limits on the use of eminent domain in poor neighborhoods"); Dana, *supra* note 31; Ilya Somin, "Is Post-*Kelo* Eminent Domain Reform Bad for the Poor?," 101 *Northwestern University Law Review* 1931, 1932 (2007) (asserting that a "law that protects the property rights of most but not all of the population is preferable to one that protects no one").
60. See *Kelo*, 545 U.S. at 498 (O'Connor, J., dissenting) (affirming that "in certain circumstances and to meet certain exigencies, takings that serve a public purpose also satisfy the Constitution even if the property is destined for subsequent private use") (citing *Berman v. Parker*, 348 U.S. 26 (1954), and *Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984)). Justice O'Connor was not on the Court when *Berman* was decided, but she authored the majority opinion in *Midkiff*, explicitly authorizing takings in the oligopolist context. Cf. Dana, *supra* note 31, at 366 ("The media, commentators, and (most importantly) legislators have revolted against the *Kelo* condemnations, however, while they quietly approved or at least accepted the *Berman* condemnation.").
61. *Kelo*, 545 U.S. at 503 (O'Connor, J., dissenting).
62. O'Connor & Day, *supra* note 44, at 315.
63. *Kelo*, 534 U.S. at 494 (O'Connor, J., dissenting).
64. *Id.* at 502.
65. *Id.* at 503.
66. See, e.g., Reva B. Siegel, "Home as Work: The First Woman's Rights Claims Concerning Wives' Household Labor, 1850–1880," 103 *Yale Law Journal* 1073, 1093 (1994) ("The market was a male sphere of competitive self-seeking, while the home was celebrated as a female sphere, a site of spiritual uplift that offered relief from the vicissitudes of market struggle.").

67. Cf. Joseph William Singer, "The Ownership Society and Takings of Property: Castles, Investments, and Just Obligations," 30 *Harvard Environmental Law Review* 309, 314 (2006) ("The most common image of property is the castle.").
68. See, e.g., *Miller v. U.S.* 357 U.S. 301, 307 (1958) (invoking an assertion attributed to William Pitt, "The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England cannot enter—all his force dares not cross the threshold of the ruined tenement!").
69. Cf. D. Benjamin Barros, "Home as a Legal Concept," 16 *Santa Clara Law Review* 255, 296–97 (2006) (arguing that it was "surprising and disappointing" that the Court in *Kelo* "did not even discuss the possibility that homes could be treated differently than other types of property in the eminent domain context").
70. Karl Marx & Friedrich Engels, *The Communist Manifesto* (1848). Cf. Richard Posner, "Foreword: A Political Court," 119 *Harvard Law Review* 31, n.180 (2005) (noting the echo).
71. 545 U.S. 748 (2005).
72. *Id.* at 751.
73. *Id.* at 752. The permanent order gave the father some visitation rights and parenting time on arrangement by the parties. See *Gonzales v. City of Castle Rock*, 366 F.3d 1093, 1097 (10th Cir. 2004) (en banc).
74. *Castle Rock*, 545 U.S. at 753.
75. *Id.* at 753–54.
76. *Id.* at 754.
77. *Id.*
78. *The Shining* (Warner Bros. Pictures, 1980), based on Stephen King, *The Shining* (New York: Doubleday, 1977).
79. Here I refer to the American gothic tradition. See, e.g., Edgar Allen Poe, *The Fall of the House of Usher* (1839); Nathaniel Hawthorne, *The House of the Seven Gables* (1851).
80. See Lewis & Cho, *supra* note 28, at 79 (stating that the hotel "promises to relieve us of the home's most troubling aspect, namely, the fact of its existence as property" that "must be cared for, maintained, and upheld," but that "the ownership we attempt to escape often returns, like the repressed itself, as the hotel's most disconcerting aspect. We need only recall the terrible memory of finding a stain on the hotel bed's sheets. . . ."). That the protagonist is the *caretaker* of the hotel who is trapped there in the winter puts into relief the unavailability of escape from the troubling aspects of home. Recall also that the Weare proposal to take Justice Souter's home envisioned turning it into not just any business establishment, but a hotel, deploying the uncanny theme of home that is not home. See above, section I.A. The hotel is the setting of the paradigmatic psychological horror film, Alfred Hitchcock's thriller, *Psycho* (Paramount Pictures, 1960).
81. Cf. Frank Manchel, "What about Jack? Another Perspective on Family Relationships in Stanley Kubrick's *The Shining*," 23.1 *Film Literature Quarterly* 68, 68 (1995) ("*The Shining*'s reception is skewed by a contemporary critical desire to make Jack Torrance—the white, American, middle-class father—the scapegoat for the sins of a patriarchal society.").
82. See Jeannie Suk, "Criminal Law Comes Home," 116 *Yale Law Journal* 2 (2006).
83. She sued the town under 42 U.S.C. § 1983. The Due Process Clause provides: "[N]or shall any State deprive any person of life, liberty, or property without due process of law. . . ." U.S. Const. amend. XIV, § 1.
84. See Suk, *supra* note 82, at 10.
85. In the words of one Texas court in a spousal burglary case, a protection order's stay-away provision effectively gave a wife "exclusive right of possession" and "negated" all of the husband's rights to enter the marital home in which they resided together. *Ex Parte Davis*, 542 S.W.2d 192, 195–96 (Tex. Crim. Ct. App. 1976).

86. See Suk, *supra* note 82, at 66.
87. See, e.g., Cheryl Hanna, “No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions,” 109 *Harvard Law Review* 1849, 1853 (1996) (“Abused women often will not cooperate and refuse to appear in court.”).
88. *Gonzales v. City of Castle Rock*, 366 F.3d 1093, (10th Cir. 2004) (en banc).
89. *Id.* at 1099–1102. The court had to distinguish the case from *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989), in which the Supreme Court famously refused to find a substantive due process right to the state’s protection of individuals from private violence.
90. See *Castle Rock*, 366 F.3d, at 1101 (citing *Bd. of Regents of State Coll. v. Roth*, 408 U.S. 564 (1972); *Perry v. Sindermann*, 408 U.S. 593 (1972); *Goss v. Lopez*, 419 U.S. 565 (1975); *Sniadach v. Family Fin. Corp.*, 395 U.S. 337 (1969); *Barry v. Barchi*, 443 U.S. 55 (1979); *Bell v. Burson*, 402 U.S. 535 (1971); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982); *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1 (1978); *Mathews v. Eldridge*, 424 U.S. 319 (1976); *Goldberg v. Kelly*, 397 U.S. 254 (1970)).
91. *Id.* at 1109.
92. *Id.* at 1102–07.
93. *Id.* at 1107.
94. *Id.* at 1108.
95. *Id.* at 1107 (quoting Transcript of Colorado House Judiciary Hearings on House Bill 1253, February 15, 1994).
96. *Id.* at 1107–08. The court then found that Jessica Gonzales had been denied her right not to have her property taken without a hearing when the police failed to heed her calls for enforcement of the order. *Id.* at 1116–17.
97. Cf. Daryl J. Levinson, “Rights Essentialism and Remedial Equilibration,” 99 *Columbia Law Review* 857 (1999).
98. See *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 761–62 (2005).
99. See *id.* at 761 (quoting Colo. Rev. Stat. § 18-6-803.5(3)(a) (Lexis 1999)).
100. The President of National Organization for Women proclaimed, “This is a truly outrageous decision—the U.S. Supreme Court just hung a ‘shoot here’ sign around the necks of battered women and their children all across the country.” Press Release, National Organization for Women, Supreme Court Leaves Women More Vulnerable to Domestic Violence (June 28, 2005), available at <http://www.now.org/press/06-05/06-28.html>. See also Sarah M. Buel, Commentary, “Battered Women Betrayed,” *Los Angeles Times*, July 4, 2005, at 13 (“The unavoidable result of this decision is that cowardly cops will once again feel empowered to ignore battered women’s pleas for help.”); Michelle Kline, “Gonzales Ruling Endangers Women and Children,” *Nat’l NOW Times* (Nat’l Org. for Women), Summer/Fall 2005, available at <http://www.now.org/nnt/summerfall-2005/gonzalesvcastlerock.html>.
101. *Castle Rock*, 545 U.S. at 779 (Stevens, J., dissenting).
102. See *id.* at 784 (“[T]he Court fails to come to terms with the wave of domestic violence statutes that provides the crucial context for understanding Colorado’s law.”).
103. Conference Advertisement, University of Denver Strum College of Law et al., *Town of Castle Rock v. Gonzales*: Some are Guilty—All are Accountable: Accountability in the Age of Denial, <http://www.aclu.org/pdfs/gonzalesconference.pdf> (last visited August 7, 2008).
104. See, e.g., Emily J. Sack, “The Domestic Relations Exception, Domestic Violence, and Equal Access to Federal Courts,” 84 *Washington University Law Review* 1441, 1441–42, 1500–10 (2006) (arguing that *Castle Rock* denies federal rights to victims of domestic violence and in doing so denies women full citizenship); Deborah M. Weissman, “The Personal Is Political—and Economic: Rethinking Domestic Violence,” 2007 *Brigham Young University Law Review* 387, 399 (“After years of efforts to develop law enforcement protocols and pass new laws to oblige the arrest of violators of domestic violence orders, the Court ruled that the police were not required to

- enforce restraining orders, even where state law required enforcement.”). See also Sara B. Poster, “An Unreasonable Constitutional Restraint: Why the Supreme Court’s Ruling in *Town of Castle Rock v. Gonzales* Rests on Untenable Rationales,” 17 *Temple Political & Civil Rights Law Review* 129 (2007); Nicole M. Quester, “Decision in *Town of Castle Rock v. Gonzales* Continues to Deny Domestic Violence Victims Meaningful Recourse,” 40 *Akron Law Review* 391 (2007); Christopher J. Roederer, “Another Case in *Lochner*’s Legacy, the Court’s Assault on New Property: The Right to the Mandatory Enforcement of a Restraining Order Is a ‘Sham,’ ‘Nullity,’ and ‘Cruel Deception,’” 54 *Drake Law Review* 321 (2006).
105. See, e.g., *Castle Rock*, 545 U.S. at 761 (noting that “a true mandate of police action” might emerge from language stronger than that used by the Colorado Legislature).
  106. See *id.* at 768 (stating that the Court’s holding “does not mean States are powerless to provide victims with personally enforceable remedies,” and that “the people of Colorado are free to craft such a system under state law”).
  107. See, e.g., Diane Carman, “*Castle Rock* Ruling Needs a Response,” *Denver Post*, July 5, 2005, at B1 (“We’ve got to come back with a law that says more clearly what we thought we were doing in the first place . . . We have to make it very, very clear to law enforcement that we’re not talking about [responding] if you feel like it.”) (quoting Colorado State Representative Morgan Carroll); Editorial, “High Court Wrong on Police’s Duties,” *Miami Herald*, July 1, 2005, at 22A; Press Release, American Civil Liberties Union, ACLU Disappointed with Supreme Court Ruling on Domestic Violence Orders of Protection (June 27, 2005) (“[S]tate legislatures must take the lead in protecting victims of domestic violence and pass laws that will hold police accountable for taking protection orders seriously.”); G. Kristian Miccio, “What Does ‘Shall’ Mean?,” *Denver Post*, July 17, 2005, at E3 (“We should move on . . . to the state Capitol and demand that Colorado legislators mean what they say.”); Press Release, Oklahoma House of Representatives, Protection for Abused Women Weakened by Supreme Court: Lawmaker Vows to Strengthen State Law in Response (June 29, 2005). The National Network to End Domestic Violence referred to *Castle Rock* in urging Congress to strengthen and reauthorize the Violence Against Women Act (VAWA). Press Release, The National Network to End Domestic Violence, Statement of Fernando Laguada, Counsel of Record (June 27, 2005). VAWA was reauthorized, and now provides grants for “Jessica Gonzales Victim Assistants” who serve as liaisons between DV victims and local law enforcement to “assist or secure the safety of the person seeking enforcement of a protection order.” Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, § 101 (2005).
  108. See *Castle Rock*, 545 U.S. at 764–65.
  109. *Id.* at 765 (emphasis added).
  110. *Id.* (quoting Blackstone’s view that “besides the injury [they do] to individuals,” criminal acts “strike at the very being of society”).
  111. See, e.g., Reva B. Siegel, “‘The Rule of Love’: Wife Beating as Prerogative and Privacy,” 105 *Yale Law Journal* 2117, 2173–74 (1996) (“[D]espite the contemporary feminist movement’s efforts to pierce the veil of privacy talk surrounding [marital violence], Americans still reason about marital violence in the discourse of affective privacy.”).
  112. Domestic violence is also an international human rights issue. For example, the ACLU filed a petition with the Inter-American Commission on Human Rights on behalf of Jessica Gonzales, claiming violations of the American Declaration of the Rights and Duties of Man. See *Gonzales v. U.S.*, Case 12.626, Inter-Am C.H.R., Report No. 52/07, OEA/Ser/L/V/II.128, doc. 19 (2007) (deciding that the IACHR can hear Gonzales’s case). See also American Civil Liberties Union, Violence Against Women: Jessica Gonzales v. U.S.A., <http://www.aclu.org/womensrights/violence/gonzalesvusa.html> (last visited June 26, 2008) (detailing all events and documents in the case).
  113. *Castle Rock*, 545 U.S. at 779–84 (Stevens, J., dissenting).
  114. See *id.* at 766–68.

115. See *id.* at 767.
116. Cf. *id.* at 772 (Souter, J., concurring) (stating that Jessica Gonzales’s due process claim “collaps[es] the distinction between property protected and the process that protects it, and would federalize every mandatory state-law direction to executive officers”).
117. A chiasmus is a rhetorical figure wherein two related clauses feature inverted parallelism, or a criss-cross structure.
118. Homi K. Bhabha, *The Location of Culture* (London, New York: Routledge, 1994), 9 (characterizing the “unhomely moment” as one in which “the borders between home and world become confused; and uncannily, the private and the public become part of each other”).